CERTIFICATE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 847

HENRY C. HILL, WARDEN UNITED STATES NORTHEASTERN PENITENTIARY

vs.

THE UNITED STATES, EX REL. THOMAS M. WAMPLER

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

FILED MARCH 19, 1936

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1 In United States Circuit Court of Appeals for the Third Circuit

No. 5892, October Term, 1935

HENRY C. HILL, WARDEN UNITED STATES NORTHEASTERN PENITENTIARY, APPELLANT

v.

UNITED STATES EX REL. THOMAS M. WAMPLER, APPELLEE

On Appeal from the District Court of the United States for the Middle District of Pennsylvania

Before BUFFINGTON, DAVIS, and THOMPSON, Circuit Judges

Certificate to the Supreme Court

Filed March 16, 1936

Statement of facts

In order to be guided by a proper decision in this case, the Circuit Court of Appeals for the Third Circuit desires the instruction of the Supreme Court of the United States and therefore, under authority of Section 239 of the Judicial Code, certifies questions of law arising from the following facts:

Thomas M. Wampler was indicted in the District Court of the United States for the District of Maryland on January 12, 1933, for violation of the income tax laws (U. S. C. A., Title 26, Sec.
2 2146). The indictment contained two counts, each count charging that Wampler had attempted to evade and defeat the payment of income tax by means of filing false and fraudulent returns for the years 1930 and 1931.

After a long trial he was, on December 12, 1933, convicted by a jury upon both counts of the indictment. On December 28, 1933, the judgment of the Court was pronounced as follows: "Fine five thousand dollars and eighteen months in penitentiary on each count of the indictment, said terms of imprisonment to be computed as beginning this 28th day of December 1933; fines to be cumulative and terms of imprisonment to run concurrently and that traverser pay costs of proceedings."

On the same day the Clerk of the United States District for the District of Maryland issued and forwarded to the United States Northeastern Penitentiary at Lewisburg, Pennsylvania, the commitment in which the judgment of the court was set out as follows: "That the traverser pay a fine of Five Thousand Dollars and be imprisoned in the United States Northeastern Penitentiary at Lewisburg, Pennsylvania, for eighteen months on each count of the indictment; said term of imprisonment to be computed as beginning

this 28th day of December 1933; the fines to be cumulative and the terms of imprisonment to run concurrently; and that the traverser pay the costs of prosecution; and in default of payment of said fines and costs, he stand further committed until the payment of said fines and costs or until discharged by due process of law."

On April 21, 1935, Thomas M. Wampler filed in the United States District Court for the District of Maryland, in the matter of United States vs. T. Morris Wampler, No. 17112 Criminal, a petition
3 directed to the Judge of the said Court, in which petition he alleged that the Court did not adjudge or provide or order that he was to stand committed until said fine and costs be paid; that the Clerk of the Court, in preparing the commitment, provided that the consequence of the non-payment of fine and costs shall be commitment in default thereof; and further alleged that the provision for commitment in default of payment of fine and costs was no part of the sentence imposed upon him by the Court. He prayed that "the record and commitment herein may be corrected nunc pro tunc to conform to the sentence as pronounced by the Court and that an order amending the commitment herein nunc pro tunc by striking therefrom the following: 'to stand committed until said fine and costs are paid'; and that the petitioner may have such further relief to which he may be entitled."

The prayer of this petition was, on April 25, 1935, denied by the sentencing Court, at which time that Court filed an opinion, in which it pointed out that Maryland is a common-law state; that the practice in the State courts is not to include in the judgment of the Court the express direction that the defendant stand committed until the fines are paid; that it has always been the practice in the District Court for the District of Maryland to follow the procedure in the State Court, but that the Clerk of the Court has instructions from the Court to include in the commitment the express provision that the defendant stand committed until the fines are paid, unless otherwise directed by the Court. No appeal was noted by Thomas M. Wampler from the decision of the Court.

Under date of July 23, 1935, Thomas M. Wampler filed in
4 the United States District Court for the Middle District of Pennsylvania, at Scranton, Pennsylvania, a petition for writ of habeas corpus, alleging that his detention at that time, based upon the fact that his actual imprisonment had expired, was unlawful, illegal and not justified either by the judgment or by the law, and praying that the legality of the said imprisonment be inquired into and declared unlawful and that he be discharged. Under date of July 31, 1935, an order was made by the Judge of the District Court for the Middle District of Pennsylvania, ordering Thomas M. Wampler discharged from the custody of the Warden of the Northeastern Penitentiary.

From that order an appeal was taken by Henry C. Hill, Warden of the Northeastern Penitentiary, respondent in said habeas corpus

proceeding. Pending the appeal, the United States Circuit Court of Appeals for the Third Circuit, feeling that the questions raised were of importance to the administration of Federal criminal law, stated that they should be certified to the Supreme Court of the United States.

The questions of law, growing out of the foregoing facts upon which the United States Circuit Court of Appeals for the Third Circuit desires instruction by the Supreme Court of the United States, are these:

Questions

1. Was the provision in the commitment for imprisonment for nonpayment of fine and costs which was inserted by the Clerk but not included in the sentence orally pronounced by the judge, (a) void? or (b) merely irregular?

2. Was the determination of the District Court on the petition to correct the commitment, a final judgment conclusive on the issue as to the validity of such commitment until reversed by appropriate proceedings for review?

3. Will habeas corpus lie in one court to correct the commitment of another court which certainly, definitely, and specifically directs the imprisonment of relator for nonpayment of fine and costs on the ground that such provision was inserted by the Clerk, but was not the sentence orally pronounced by the Court?

JOSEPH BUFFINGTON,
J. WARREN DAVIS,
J. WHITAKER THOMPSON,
Judges of the United States Circuit Court of Appeals Sitting in said case.

[Clerk's certificate to foregoing certificate omitted in printing.]

(Endorsement on cover:) File No. 40401. U. S. Circuit Court of Appeals, Third Circuit. Term No. 847. Henry C. Hill, Warden United States Northeastern Penitentiary, vs. The United States, ex rel. Thomas M. Wampler. Certificate. Filed March 19, 1936. Term No. 847 O. T. 1935.

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No. 847

In the Supreme Court of the United States

OCTOBER TERM, 1935

HENRY C. HILL, WARDEN UNITED STATES NORTHEASTERN PENITENTIARY

v.

THE UNITED STATES EX REL. THOMAS M. WAMPLER

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR HENRY C. HILL, WARDEN OF THE UNITED STATES NORTHEASTERN PENITENTIARY

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In the Supreme Court of the United States

OCTOBER TERM, 1935

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BRIEF FOR HENRY C. HILL, WARDEN OF THE UNITED STATES NORTHEASTERN PENITENTIARY

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland denying a petition to amend the commitment of the appellee below (hereinafter called the defendant) is reported in 10 F. Supp. 609. The opinion of the United States District Court for the Middle District of Pennsylvania granting the defendant's discharge on habeas corpus is reported in 11 F. Supp. 540.

JURISDICTION

The certificate of the Circuit Court of Appeals for the Third Circuit was filed in this Court March 19, 1936. The jurisdiction of this Court is conferred by Section 239 of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The questions certified are the following:

1. Was the provision in the commitment for imprisonment for nonpayment of fine and costs which was inserted by the Clerk but not included in the sentence orally pronounced by the judge, (a) void? or (b) merely irregular?

2. Was the determination of the District Court on the petition to correct the commitment, a final judgment conclusive on the issue as to the validity of such commitment until reversed by appropriate proceedings for review?

3. Will habeas corpus lie in one court to correct the commitment of another court which certainly, definitely, and specifically directs the imprisonment of relator for nonpayment of fine and costs on the ground that such provision was inserted by the Clerk, but was not the sentence orally pronounced by the Court?

STATUTES INVOLVED

R. S. 1041 (U. S. C., Title 18, Sec. 569) reads as follows:

> In all criminal or penal causes in which judgment or sentence has been or shall be rendered, imposing the payment of a fine or penalty, whether alone or with any other kind of punishment, the said judgment, so far as the fine or penalty is concerned, may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced. Where the judgment directs that the defendant shall be imprisoned until the fine or penalty imposed is paid, the issue of execution on the judgment shall not operate to discharge the defendant from imprisonment until the amount of the judgment is collected or otherwise paid.

R. S. 1042 as amended (U. S. C., Title 18, Sec. 641) is as follows:

> When a poor convict, sentenced by any court of the United States to be imprisoned and pay a fine, or fine and cost, or to pay a fine, or fine and costs, has been confined in prison thirty days, solely for the nonpayment of such fine, or fine and costs, such convict may make application in writing to any United States commissioner in the district where he is imprisoned setting forth his in-

ability to pay such fine, or fine and costs, and after notice to the district attorney of the United States, who may appear, offer evidence, and be heard, the commissioner shall proceed to hear and determine the matter. If on examination it shall appear to him that such convict is unable to pay such fine, or fine and costs, and that he has not any property exceeding $20 in value, except such as is by law exempt from being taken on execution for debt, the commissioner shall administer to him the following oath: "I do solemnly swear that I have not any property, real or personal, to the amount of $20, except such as is by law exempt from being taken on civil process for debt by the laws of (naming the State where oath is administered); and that I have no property in any way conveyed or concealed, or in any way disposed of, for my future use or benefit. So help me God." Upon taking such oath such convict shall be discharged; and the commissioner shall give to the keeper of the jail a certificate setting forth the facts.

R. S. 722 (U. S. C., Title 28, Sec. 729) provides:

The jurisdiction in civil and criminal matters conferred on the district and circuit courts by the provisions of this Title, and of Title "Civil Rights," and of Title "Crimes," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and

enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

R. S. 918 (U. S. C., Title 28, Sec. 731) provides:

The several circuit and district courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under the preceding section, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings.

STATEMENT

The facts as set forth in the certificate are as follows:

Thomas M. Wampler was indicted in the District Court of the United States for the District of Maryland on January 12, 1933, for violation of the income tax laws (U. S. C. A., Title 26, Sec. 2146). The indictment contained two counts, each count charging that Wampler had attempted to evade and defeat the payment of income tax by means of filing false and fraudulent returns for the years 1930 and 1931.

After a long trial he was, on December 12, 1933, convicted by a jury upon both counts of the indictment. On December 28, 1933, the judgment of the Court was pronounced as follows: "Fine five thousand dollars and eighteen months in penitentiary on each count of the indictment, said terms of imprisonment to be computed as beginning this 28th day of December 1933; fines to be cumulative and terms of imprisonment to run concurrently and that traverser pay costs of proceedings."

On the same day the Clerk of the United States District Court for the District of Maryland issued and forwarded to the United States Northeastern Penitentiary, at Lewisburg, Pennsylvania, the commitment in which the judgment of the court was set out, as follows: "That the traverser pay a fine of Five Thousand Dollars and be imprisoned in the United States Northeastern Penitentiary at Lewisburg, Pennsylvania, for eighteen months on each

count of the indictment; said term of imprisonment to be computed as beginning this 28th day of December 1933; the fines to be cumulative and the terms of imprisonment to run concurrently; and that the traverser pay the costs of prosecution; and in default of payment of said fines and costs, he stand further committed until the payment of said fines and costs or until discharged by due process of law."

On April 21, 1935, Thomas M. Wampler filed in the United States District Court for the District of Maryland, in the matter of *United States* vs. *T. Morris Wampler,* No. 17112 Criminal, a petition directed to the Judge of the said Court, in which petition he alleged that the Court did not adjudge or provide or order that he was to stand committed until said fine and costs be paid; that the Clerk of the Court, in preparing the commitment, provided that the consequence of the non-payment of fine and costs shall be commitment in default thereof; and further alleged that the provision for commitment in default of payment of fine and costs was no part of the sentence imposed upon him by the Court. He prayed that "the record and commitment herein may be corrected nunc pro tunc to conform to the sentence as pronounced by the Court and that an order amending the commitment herein nunc pro tunc by striking therefrom the following: 'to stand committed until said fine and costs are paid'; and that the petitioner

may have such further relief to which he may be entitled."

The prayer of this petition was, on April 25, 1935, denied by the sentencing Court, at which time that Court filed an opinion, in which it pointed out that Maryland is a common-law state; that the practice in the State courts is not to include in the judgment of the Court the express direction that the defendant stand committed until the fines are paid; that it has always been the practice in the District Court for the District of Maryland to follow the procedure in the State Court, but that the Clerk of the Court has instructions from the Court to include in the commitment the express provision that the defendant stand committed until the fines are paid, unless otherwise directed by the Court. No appeal was noted by Thomas M. Wampler from the decision of the Court.

Under date of July 23, 1935, Thomas M. Wampler filed in the United States District Court for the Middle District of Pennsylvania, at Scranton, Pennsylvania, a petition for writ of habeas corpus, alleging that his detention at that time, based upon the fact that his actual imprisonment had expired, was unlawful, illegal, and not justified either by the judgment or by the law, and praying that the legality of the said imprisonment be inquired into and declared unlawful and that he be discharged. Under date of July 31, 1935, an order was made by the Judge of the District Court for the Middle District

of Pennsylvania, ordering Thomas M. Wampler discharged from the custody of the Warden of the Northeastern Penitentiary.

From that order an appeal was taken by Henry C. Hill, Warden of the Northeastern Penitentiary, respondent in said habeas corpus proceeding. Pending the appeal, the United States Circuit Court of Appeals for the Third Circuit, feeling that the questions raised were of importance to the administration of Federal criminal law, stated that they should be certified to the Supreme Court of the United States.

SUMMARY OF ARGUMENT

1. The provision in the commitment that the defendant be imprisoned for nonpayment of fine and costs is neither void nor voidable but is valid and regular and in accord with the recognized practice of the State courts in the State of Maryland and with the established and long prevailing practice in the United States District Court for the District of Maryland.

2. The determination of the United States District Court for Maryland denying the defendant's petition to correct his commitment was a final appealable judgment with respect to the validity of such commitment by a court of coordinate competent jurisdiction and should not have been reexamined on habeas corpus by the United States District Court for the Middle District of Pennsylvania.

3. Habeas corpus is not an appropriate remedy to correct errors in the commitment of a coordinate court as to defects or irregularities not amounting to failure or excess of jurisdiction. The provision in the commitment in the case at bar was inserted pursuant to a rule or practice of court in order that the commitment might clearly express the legal effect of the sentence. Under the practice prevailing in the United States District Court for Maryland prior to 1924, the legal effect of a sentence to pay a fine was that the defendant stand committed until the fine be paid without an express direction to that effect in the sentence or the commitment. If such practice was valid, the provision in the commitment inserted pursuant to instructions given the clerk was mere surplusage and did not constitute a want or excess of jurisdiction which could be questioned by habeas corpus.

ARGUMENT

I

UNDER THE PRACTICE LONG FOLLOWED IN MARYLAND, THE PROVISION IN THE COMMITMENT FOR FURTHER IMPRISONMENT OF THE DEFENDANT FOR NONPAYMENT OF FINE AND COSTS WHICH WAS INSERTED BY THE CLERK BUT HAD NOT BEEN INCLUDED IN THE SENTENCE ORALLY PRONOUNCED BY THE JUDGE WAS NEITHER VOID NOR IRREGULAR BUT WAS VALID AND REGULAR

The first question certified assumes that the provision of the commitment directing imprisonment for nonpayment of fine and costs was either void or irregular in that the sentence orally pronounced

did not expressly contain any direction to that effect. The position taken by the defendant in the courts below was that this provision of the commitment was void. As was held in the able opinion of the United States District Court for the District of Maryland in denying the defendant's petition to correct the commitment (10 F. Supp. 609), it is our contention that the commitment was in all respects valid and regular and that under it the defendant may be lawfully detained until his fine is paid or he is discharged pursuant to the provisions of R. S. 1042 (*supra*, pp. 3-4).

The enforcement of judgments and sentences for fines and costs in criminal cases is regulated by R. S. 1041 and 1042. The former (*supra*, p. 3) provides that fines in criminal cases may be collected by execution as in civil suits but that where the judgment directs imprisonment until the fine is paid, execution shall not operate to discharge the defendant from imprisonment until the payment of such fine. R. S. 1042, as amended, provides for the release of poor convicts unable to pay a fine or fine and costs after serving thirty days' imprisonment for nonpayment thereof. Although neither section expressly provides imprisonment for nonpayment of fine or fine and costs, authority for such imprisonment is clearly implied therein and the cases have uniformly recognized the availability of this method of enforcing such judgments. See *Ex parte Jackson*, 96 U. S. 727, 737; *Ex parte Barclay*,

153 Fed. 669 (C. C. D. Me.); *Haddox* v. *Richardson,* 168 Fed. 635, 639 (C. C. A. 4th).

As we understand the position taken by the defendant in the courts below, he does not question this proposition nor does he contend that the two methods of enforcing the judgment for the fine by execution and by imprisonment are alternative or mutually exclusive. It is clear that a fine may be enforced by both methods. R. S. 1041, *supra.* The defendant's contention is that it was discretionary with the court to direct that the defendant stand committed until the fine was satisfied but that as the judgment contained no express provision to that effect, it must be deemed to have been excluded.

We submit that the fallacy which underlies the defendant's position is that it completely ignores the fact that the court which sentenced him did exercise its discretion to require imprisonment for the nonpayment of his fine and costs by virtue of the well-established practice prevailing in the District of Maryland, as will more fully appear from our discussion of that practice.

There is no Federal statute governing the form, rendition, or entry of a criminal judgment and the preparation of the commitment based thereon. While the Conformity Act does not expressly apply in Federal criminal cases, it can hardly be questioned that, in the absence of a Federal statute upon the subject, the District Court of the United

States for the District of Maryland was entitled to resort to the law and practice of that State as the basis for its own procedure. See R. S. 722 (U. S. C., Title 28, Sec. 729); *United States* v. *Thompson*, 251 U. S. 407, 416; *Ex parte Barclay*, 153 Fed. 669, 670 (C. C. D. Me.).

The Maryland Code, Public General Laws 1924, Article 38, Sec. 1, provides that if a person be adjudged guilty of an offense—

> he shall be sentenced to the fine or penalty prescribed by such act of assembly or ordinance and to the costs of his prosecution; and in default of payment thereof he shall be committed to jail until thence discharged by due course of law.

It is clear that under this statute the defendant could be committed for non-payment of fine, even though the sentence contained no such specific direction. *Backus* v. *State*, 118 Md. 536, 538. It was stated by the United States District Court for Maryland (10 F. Supp. 612) that it has not been customary in the Criminal Court of Baltimore for forty years or more for a judge imposing fines in criminal cases expressly to direct imprisonment until they are paid, although this is the invariable consequence of such a sentence, unless the judge otherwise directs at the time.

An identical practice had been adopted by the United States Court for the District of Maryland and followed by it for at least forty years. As

pointed out by the United States District Court for Maryland (10 F. Supp. 610–612) the oral judgment and written commitment rendered in the instant case was in accordance with the long established and invariable practice of that court. The approved practice has been for the judge orally to announce the amount of the fine and the term of imprisonment and for the clerk to make a docket entry reciting such term and fine with no reference in either to imprisonment for nonpayment of the fine. Thus, while it has never been the practice for the judge in imposing a fine in a criminal case in that court either with or without an accompanying specific prison term expressly to direct that the defendant stand committed to prison until the fine be paid or he be discharged in due course of law, it was, nevertheless, the invariable practice, unless the judge specifically otherwise directed, that the defendant be imprisoned for nonpayment and continue committed until he paid the fine or took the requisite oath, and this was true even though the commitment issued by the clerk did not contain an express provision for such imprisonment on account of nonpayment of fine. In March of 1924 the authority of the jailer to detain a prisoner for nonpayment of fine whose commitment did not expressly so provide was questioned. As a result the practice was slightly modified and the clerk of the District Court was instructed to include a provision for imprisonment for nonpay-

ment of fine in all subsequent commitments unless the judge otherwise directed. This has been the invariable practice since that time and has been followed by the clerk with the approval of the judges of the District Court. In the District Court, in accordance with this practice, when a defendant was sentenced to pay a fine and it was not immediately paid he was at once taken into the custody of the Marshal or deputy, one of whom was always present at the sentencing, a practice which appears to have been in general use in the Fourth Circuit (*Haddox* v. *Richardson,* 168 Fed. 635, 639). Thus it is apparent that the court by refraining from making any reference to imprisonment for nonpayment of fine in the instant case exercised its discretion to commit the defendant to imprisonment unless his fine should be paid because it knew that under the existing practice, mutually understood by the judges, the clerk, and the bar generally, the clerk would include in the commitment a direction for such imprisonment. Conversely, had it not intended that imprisonment for nonpayment of the fine be inflicted upon a given defendant, it would have expressly given instructions that such provision be omitted from the commitment.

Furthermore, it was stated by the United States District Court for Maryland (10 F. Supp. 610):

> In the present case it does not appear that execution has ever been issued nor that the

> sentence of the court made any reference thereto, nor that anything occurred from which it could be inferred that it was the intention of the judge in pronouncing the sentence to exclude the usual course of imprisonment for nonpayment of the fine.

That the Federal District Courts have the power to prescribe rules and otherwise regulate their own practice is made clear by R. S. 918 (U. S. C., Title 28, Sec. 731), the only limitation being that such rules and regulations be not inconsistent with any law of the United States. It has been held that such practices need not be reduced to written rule. *Detroit Heating & Lighting Co.* v. *Kemp,* 182 Fed. 847 (C. C. Md.); *United States* v. *Stevenson,* Fed. Cas. No. 16,395 (S. D. N. Y.); *Norton* v. *Rich,* Fed. Cas. No. 10,352 (C. C. Mass.); *Koning* v. *Bayard,* Fed. Cas. No. 7,924 (C. C. S. D. N. Y.); *Curtis* v. *Central Ry.,* Fed. Cas. No. 3,501 (C. C. Ind.).

We submit, therefore, that the instruction by the court to the clerk to include in all commitments, unless directed specifically to the contrary, a provision that the defendant stand committed until the fine be satisfied, was clearly within its rule-making power, particularly where the effect of the instruction was to make the Federal practice comformable to the long-established State practice.

The case of *Boyd* v. *Archer,* 42 F. (2d) 43 (C. C. A. 9th), is relied upon by the defendant to

support his position that the provision in the commitment for imprisonment for nonpayment of fine and costs which was inserted by the clerk but not included in the judge's oral sentence is void. In that case the facts were similar, that is, the judgment contained no direction for further imprisonment, on account of the fine, beyond the actual imprisonment imposed, and the clerk inserted a clause in the commitment stating that the prisoner be further imprisoned until he should have paid the fine or been discharged by law. It was held that under R. S. 1041 it is discretionary with the court to order or not to order a defendant imprisoned for nonpayment of fine; that the trial court did not in that case direct such imprisonment; that therefore the clerk acted without authority, and that that part of the commitment was void. We submit that the *Boyd* case is distinguishable from the case at bar because there is nothing in the Boyd decision to indicate the existence of any such rule or practice in the District Court for the Western District of Washington, where that case arose, as existed in the District Court for Maryland, where the instant case arose. It may be further stated that in that case the position of the court was influenced largely by the concession on the part of the warden that the provision in the commitment was void.

II

THE DETERMINATION OF THE UNITED STATES DISTRICT COURT FOR MARYLAND DENYING THE PETITION TO CORRECT THE COMMITMENT WAS A FINAL APPEALABLE JUDGMENT WITH RESPECT TO THE VALIDITY OF SUCH COMMITMENT AND THE WRIT OF HABEAS CORPUS MAY NOT BE USED FOR THE PURPOSE OF REEXAMINING THE ISSUES THEREBY DETERMINED.

The second question certified is:

> Was the determination of the District Court on the petition to correct the commitment a final judgment conclusive on the issue as to the validity of such commitment until reversed by appropriate proceedings for review.

The proceeding in which was rendered the decision of the District Court denying the defendant's petition to correct his commitment (10 F. Supp. 609) was begun long after the judgment of conviction had become final—approximately one year and four months after his sentence. It is clear under Section 128 of the Judicial Code (U. S. C., Title 28, Sec. 225) that such decision was reviewable on appeal to the Circuit Court of Appeals for the Fourth Circuit. That section provides that:

> The circuit courts of appeal shall have appellate jurisdiction to review by appeal or writ of error final decisions—
>
> First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 238.

Although apparently entitled in the criminal case, it is evident that the petition to correct the commitment cannot be considered as a step in that case. That case had been concluded and the petition to amend the commitment was an independent collateral proceeding growing out of the criminal case. The court's decision refusing to grant the petition to amend the commitment completely disposed of the issues therein presented and therefore was a "final decision" within the meaning of Section 128 of the Judicial Code. Cf. *Cogen* v. *United States,* 278 U. S. 221, 225, 226; *Go-Bart Co.* v. *United States,* 282 U. S. 344, 356; *Ackerson* v. *United States,* 15 F. (2d) 268 (C. C. A. 2d).

Although the decision of the District Court refusing to correct the commitment was an appealable order, no appeal was taken therefrom by the defendant. Instead, the defendant chose to file in the United States District Court for the Middle District of Pennsylvania a petition for a writ of habeas corpus in which he sought again to litigate the very issues which had been determined against him in the District Court for Maryland, except that, at this time, his immediate aim was the attainment of his discharge from imprisonment rather than the amendment of his commitment. The court to which the defendant applied for habeas corpus should have given controlling weight to the prior determination by a court of coordinate competent jurisdiction, particularly where the is-

sues had previously been raised in a direct attack and before the very court which imposed the sentence and from which the commitment issued. Cf. *Salinger* v. *Loisel,* 265 U. S. 224, 231. What the defendant was really attempting to do in the Pennsylvania court was to secure a review of the issues which had already been decided against him in Maryland, thereby converting the writ of habeas corpus into a substitute for an appeal. This Court has often held that this is not a proper function of the writ. *Dimmick* v. *Tompkins,* 194 U. S. 540, 552; *United States* v. *Valante,* 264 U. S. 563, 564; *Wales* v. *Whitney,* 114 U. S. 564, 570–571.

III

HABEAS CORPUS WILL NOT LIE TO DISCHARGE A PRISONER FOR MERE ERRORS OR IRREGULARITIES IN THE FORM OF THE COMMITMENT UNDER WHICH HE IS HELD, UNLESS SUCH DEFECTS RENDER THE COMMITMENT VOID IN WHOLE OR IN PART FOR WANT OR EXCESS OF JURISDICTION ON THE PART OF THE COMMITTING COURT

The third question certified to the Circuit Court of Appeals was as follows:

> Will habeas corpus lie in one court to correct the commitment of another court which certainly, definitely, and specifically directs the imprisonment of relator for nonpayment of fine and costs on the ground that such provision was inserted by the Clerk, but was not the sentence orally pronounced by the Court?

If this Court, in response to the first two questions certified, holds that the commitment in the case at bar was valid and not void or irregular, or that the adjudication on the defendant's petition to correct his commitment should have been given controlling weight in the subsequent habeas corpus proceeding, an answer to the third question may not be required. It is submitted, however, that even if the commitment was irregular or erroneous with respect to the provision for imprisonment for nonpayment of fine, that alone did not warrant the court below in ordering the discharge of the defendant. This Court has held that a habeas corpus proceeding is a collateral attack of a civil nature on the judgment or sentence of another court in a criminal case, *In re Frederich,* 149 U. S. 70, 76, that the record of the sentencing court imports absolute verity, *Riddle* v. *Dyche,* 262 U. S. 333, 336, and that the province of habeas corpus is to call into question only the jurisdiction of the court whose proceedings are under review, not to correct errors in the records of that court. *Collins* v. *Johnston,* 237 U. S. 502, 505; *Frank* v. *Mangum,* 237 U. S. 309, 326; *Harlan* v. *McGourin,* 218 U. S. 442, 445; *Kaiza* v. *Henry,* 211 U. S. 146, 148.

The commitment if not inconsistent with the minutes and docket entries of the court is the official certified record of the judgment and from it must be obtained the intention of the judge as to the sentence he intended to impose. *Ex parte*

Lamar, 274 Fed. 160, 174. The commitment serves to record accurately the terms of the sentence, to advise the prisoner what penalty is imposed and to advise the jailor so that he may keep the prisoner and require the fulfillment of the sentence so imposed. *Ex parte Lamar, supra,* at 172.

Under the practice prevailing in the State courts of Maryland, the defendant sentenced to pay a fine in a criminal case is subject to imprisonment for nonpayment thereof without any direction to that effect in the commitment, and this was formerly the rule in the United States District Court for the District of Maryland (10 F. Supp. 609, 611). As heretofore noted, in March 1924, the clerk of court was instructed in subsequent commitments to insert a direction for imprisonment for nonpayment of fine. In other words, the practical consequences of nonpayment of fine were thereafter to be specifically stated in the commitment. The reason for instructing the clerk in 1924 to include such a provision was to make clear to wardens of Federal penal institutions the exact legal effect of a sentence of fine. Prior to that time wardens receiving prisoners from Maryland, and possibly from other jurisdictions following a similar practice, were compelled to look beyond the commitment for an interpretation of the sentence. When the commitment is regarded in this light, the defendant's attack thereon is without merit. If the practice prevail-

ing for at least 28 years prior to 1924 in the United States Court for the District of Maryland was valid, the extra precaution involved in instructing the clerk to state fully in the commitment the legal effect of the sentence was mere surplusage and is, therefore, hardly subject to the objection that the court exceeded its jurisdiction and that habeas corpus is the proper remedy.

Thus, whether the commitment be regarded as the record of the sentence importing absolute verity on collateral attack, or whether the provision for imprisonment for nonpayment of fine be regarded as surplusage, having in mind the practice prior to 1924, we submit that the third question should be answered in the negative.

CONCLUSION

We respectfully submit that the answer to the first question should be that the provision in the commitment for imprisonment for nonpayment of fine and costs was neither void nor irregular but was valid and regular; that the answer to the second question should be that the determination of the District Court on the petition to correct the commitment was a final appealable judgment with respect to the validity of such commitment and that the writ of habeas corpus may not be used for the purpose of reexamining the issues thereby determined; and that the answer to the third ques-

tion, in the light of the facts and circumstances in the instant case, should be in the negative.

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APRIL 1936.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 847

HENRY C. HILL, WARDEN UNITED STATES NORTHEASTERN PENITENTIARY,

vs.

THE UNITED STATES EX REL. THOMAS M. WAMPLER.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THOMAS M. WAMPLER.

ROBERT E. LYNCH,
Counsel for Thomas M. Wampler.

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BRIEF FOR THOMAS M. WAMPLER.

Opinions Below.

The opinion of the United States District Court for the District of Maryland denying a petition to amend the commitment of the appellee below (hereinafter called the defendant) is reported in 10 F. Supp. 609. The opinion of the United States District Court for the Middle District of Pennsylvania granting the defendant's discharge on habeas corpus is reported in 11 F. Supp. 540.

Jurisdiction.

The certificate of the Circuit Court of Appeals for the Third Circuit was filed in this Court March 19, 1936. The jurisdiction of this Court is conferred by Section 239 of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented.

The questions certified are the following:

1. Was the provision in the commitment for imprisonment for nonpayment of fine and costs which was inserted by the Clerk but not included in the sentence orally pronounced by the judge, (a) void? or (b) merely irregular?

2. Was the determination of the District Court on the petition to correct the commitment, a final judgment conclusive on the issue as to the validity of such commitment until reversed by appropriate proceedings for review?

3. Will habeas corpus lie in one court to correct the commitment of another court which certainly, definitely, and specifically directs the imprisonment of relator for nonpayment of fine and costs on the ground that such provision was inserted by the Clerk, but was not the sentence orally pronounced by the Court?

Statements Involved.

The applicable statutes are set forth in the appellant's brief.

Statement.

The complete statement of facts are set forth in the appellant's brief.

Summary of Argument.

(1) The provisions in the commitment inserted by the Clerk of the Court that the defendant be imprisoned for nonpayment of fine and costs is void and contrary to R. S. 1041, U. S. C., Title 18, Section 569, and imprisonment for nonpayment of such fines and costs is illegal.

(2) The determination of the United States District Court for Maryland denying the petition to amend the commitment was not such a final order or judgment as to bar the appellee from securing a writ of habeas corpus to test the legality of his imprisonment.

(3) Habeas corpus will lie in one court to correct a commitment of another court which commitment does not conform to the sentence and judgment of the Court.

ARGUMENT.

(1)

The provisions in the commitment inserted by the Clerk of the Court providing for imprisonment for nonpayment of fines and costs is void as not consistent with the judgment of the Court.

The Court orally announced the sentence upon the appellee, defendant, and the judgment of the Court was recorded as follows: "Fine five thousand dollars and eighteen months in pentitentiary on each count of the indictment, said terms of imprisonment to be computed as beginning this 28th day of December, 1933; fines to be cumulative and terms of imprisonment to run concurrently and that traverser pay costs of proceedings." The Clerk of the Court, however, in issuing the Commitment added the following: "And in default of payment of said fines and costs, he stand further committed until the payment of said fines

and costs or until discharged by due process of law." The contention of the appellee is that the judgment of the Court as recorded is controlling and the Clerk is without power or authority to change the judgment records of the Court and any attempt to do so renders that part of the judgment void.

R. S. 1041 (U. S. C.), Title 18, Section 569, provides in part "Where the *judgment directs* that the defendant shall be imprisoned until the fine or penalty imposed is paid * * *." Under this section the Court has discretionary power to require imprisonment upon the nonpayment of the fine or penalty but there may be cases supposed where the Court imposes imprisonment and fine that the Court does not wish further imprisonment upon the default of the payment of the fine. The defendant may have property from which the fine may be paid or the Government may execute upon the "judgment" the same as in civil cases. Incarceration is one form of punishment and the payment of a fine or penalty is another form and under R. S. 1041 it is submitted that the judgment must direct the imprisonment of the defendant upon the nonpayment of the fine or penalty, otherwise the Government is entitled to proceed only against the defendant's property.

Government's counsel in their brief at page 15 would interpret R. S. 1041 as providing that an accused should be imprisoned as a matter of course upon the nonpayment of a fine or penalty unless the Court should direct to the contrary. It is submitted that the language of R. S. 1041 discloses a different meaning when it states "Where the judgment directs that the defendant shall be imprisoned until the fine or penalty imposed is paid * * *." The Courts have so interpreted the Statute. There should not be imprisonment of a person by usage and custom.

The judgment as announced by the Court and the judgment as recorded by the Clerk did not provide that the de-

fendant stand further commitment in the event of a default in the payment of the fines. Admittedly the Clerk inserted this provision in the commitment. This question has been specifically passed on by the Federal courts.

In the case of *Boyd* v. *Archer*, 42 F. (2d) pages 43 and 44, the Court said:

> "* * * that the first judgment in the Washington District (entered February 27, 1928, in cause No. 11630) directed that he be imprisoned for fifteen months at McNeil's Island and 'pay a fine of $1,000.00,' without any provision for further imprisonment in case of default in the payment of the fine. Because of an appeal, commitment of this judgment did not issue until March 7, 1929, and appellant commenced serving the sentence of imprisonment on March 15, 1929.
>
> "Though, as already noted, this judgment contained no direction for further imprisonment on account of the fine, the clerk inserted in the commitment the clause, 'and that he (appellant) be further imprisoned at the same place until he shall have paid said fine or until he shall be discharged by law.' This insertion constitutes the basis of a minor contention which may be summarily disposed of by saying that under section 1041, Rev. St. U. S. (18 U. S. C. A. 569), *it is discretionary with the court to order or not to order a defendant imprisoned in case of his failure to pay a fine, that the court did not in this case direct such imprisonment, and that therefore the clerk having acted without authority in making the entry that part of the commitment is void.* See *Wagner* v. *United States* (C. C. A.), 3 F. (2d) 864. This view being conceded by appellee, further discussion is unnecessary." (Italics supplied.)

In *Wagner* v. *U. S.*, 3 F. (2d) page 864, the Court said:

> "Section 1041, Rev. Stats. (Comp. St. 1705) authorizes imprisonment until the fine or penalty imposed be paid, and under that statute it is discretionary with the court whether or not it will order the defendant into custody until the fine is paid."

In *ex parte Jackson*, 96 U. S. 727, the Court in the opinion, said:

> "The commitment of the petitioner to the county jail, until his fine was paid was within the discretion of the court under the statute."

The brief of the appellant, page 10, states "The provision in the commitment in the case at bar was inserted pursuant to a *rule* of *practice* of Court in order that the commitment might clearly express the legal effect of the sentence" and on page 14, same brief, states "The approved practice has been for the Judge orally to announce the amount of the fine and the term of imprisonment and for the clerk to make a docket entry reciting such term and fine with no reference in either to imprisonment for nonpayment of the fine." It must be conceded that there was no rule of Court as the word "rule" is understood. Rules of court are duly promulgated by the Court and published so that the bar and litigants may be informed of the same. Whether the practice was as outlined by the United States District Court for the District of Maryland in its opinion (10 F. Supp. 609) is of no moment for it cannot be controlling, for the simple reason that if the practice were not in accordance with law, then, irrespective of the length of that practice, it cannot gain validity merely by its age.

There is no need for reference to the procedure of the State courts in Maryland as the Federal Statute is clear. If such a "practice" as contended is permissable and legal then there is no reason why the Court should not say to the Clerk that where he pronounces a judgment upon a person convicted of an offense under an indictment containing more than one count, that the Clerk shall, in preparing the commitment, regard the terms of imprisonment under each count as cumulative and not to run concurrently. If the Court follows such a "practice" for five years and suddenly

drops dead, is his successor to continue such "practice"?

The only cases which have reached the Appellate Court have been decided in accordance with the contention of the appellee herein; *there are no decisions contrary to the decision of the lower court in this case.*

The judgment was recorded as pronounced by the Court. The judgment set forth in the commitment was neither pronounced by the Court nor recorded by the Clerk. *The commitment is contrary to and contradictory of the recorded judgment of a Court of record.* The appellee was confined by direction of a clerk in a commitment to imprisonment, not directed by any Court or any judgment to be found of record anywhere, but issued by the Clerk. The Court from the bench pronounced one judgment; it was recorded as pronounced. But the Clerk added a phrase to the judgment in the commitment which was not contained in or *recorded upon the judgment roll.*

The appellee's sole contention in this case is that there can be no such thing in law as a commitment differing from and contradictory of the recorded judgment upon which it is based. The validity of a commitment depends upon the validity of the judgment; the judgment is the authority for the existence of the commitment; the commitment can not go further than that upon which it depends for its very existence and validity. In the case at bar there is not to be found *in the judgment roll* any authorization for the insertion made by the Clerk in the commitment.

Appellee has not found an authority holding that a commitment differing from the *judgment as recorded is valid.* This case is not an attack upon the judgment, but an attack upon the commitment, *because it does not conform to the judgment as recorded upon the records of the Court.*

The statute above quoted makes it discretionary whether the Court shall direct commitment in default of the payment of a fine, and such is the construction and interpretation of

the statute by every Appellate Court before whom the question has been raised.

In this case there is nowhere to be found a judgment of record as described by the Clerk in the commitment.

The commitment in the case at bar does not conform to the recorded judgment, differs therefrom, is contrary to, and contradictory of the *recorded* judgment, and is for that reason invalid.

In the brief for appellant, it is sought to justify the legality of the commitment in this case by reason of a practice said to prevail in Maryland. Appellant seeks to support its position by reference to the case of *Haddox* v. *Richardson,* 168 Fed. 635, but scrutiny of the quoted part of the opinion discloses that the Court said:

> "It is a usual and ordinary course *for the Court* to commit the person required to pay the fine • • • that at the expiration of the term of imprisonment and in default of the payment of the fine or costs or the fine and costs, *according to the terms of the sentence.*"

With this decision appellee is in accord. The appellant loses sight of the fact that the commitment in this case is not drawn according to the terms of the *sentence and judgment of the Court.*

Appellant seeks to support its position by an opinion of the judge of the District Court of Maryland rendered upon a motion to correct the commitment.

In the opinion of the District Court of Maryland, the Court relies upon *Ex Parte Watkins,* 7 Peters 567.

There is no need for a Court to resort to the common law when there is in existence an applicable Federal Statute which has been construed and interpreted by Federal Appellate Courts. But an examination of the cases cited by the District Court of Maryland to sustain its position discloses the following thus:

In *ex parte Watkins, supra,* decided in 1829, the Supreme Court, *dealing with the early Maryland law, says:*

"Let us see, then, how the case stands upon the laws of Maryland, by which, indeed, it is to be governed. The Act of Maryland of the 20th of April, 1777 (ch. 6), which seems specially applicable to the recovery of pecuniary fines and forfeitures fixed by statute, declares that if such fines and forfeitures shall be recovered by indictment, the *Court* may either commit the offender to the public jail till the payment to the sheriff, or order execution to levy the same on the offender's lands, goods or chattels. * * * In another section of the act (Sec. 4), there is a proviso that nothing therein contained shall be construed to extend to prevent the several *courts,* as they might heretofore lawfully do, from committing any person for the non-payment of any fine, if they shall deem it expedient so to do. This proviso completely establishes the antecedent practice in Maryland to have been like that of the common law, to commit the offender for payment of the fine, *and leaves it at the discretion of the Court to order it in any future case. By necessary implication it affirms that without such order the offender is not detainable in jail for the fine.*"

"It has been said that where the party convicted is already in custody when the sentence is passed, the party is to be deemed in custody until the fine is paid, without any award of a commitment in the sentence, or the issuing of any capias ad satisfaciendum. We know of no authority justifying this position, whether at the common law or under the laws of Maryland. *On the contrary, the Act of Maryland of* 1777 (*ch.* 13) *plainly allows a discretion in the court to commit or not to commit for the fine. The omission to award a commitment, as a part of the sentence, is manifestly an exercise of such a discretion.*" (Italics supplied.)

In *ex parte Barclay,* 153 Fed. 669, relied upon by the appellant, the Court said:

> "The only penalty imposed for the offense is a fine of not more than $1,000 nor less than $50. No penalty of imprisonment is provided. The *sentence* imposed, or the order incorporated therewith, directed in the usual form that, in default of payment of the fine, Barclay should stand committed to jail until the fine should be paid or he should be otherwise discharged according to law. The *mittimus or warrant followed the sentence in this respect.* * * * Of course, it is conceded that a statutory implication may have the force of express phraseology."
>
> "In addition to the above, turning to sections 1041 and 1042 of the Revised Statutes, which are re-enactments of Act of June 1, 1872, c. 225, 17 Stat. 198 (U. S. Comp. St. 1901, p. 724), constituting the first statutory provision claimed by either party to bear on this topic, while it may well be claimed that the provisions of these two sections do not necessarily recognize the practice of the Federal courts in the particulars which we have stated, yet the fair construction of them is to the effect that they impliedly and fully confirm it." (Italics supplied.)

The opinion of the District Court in granting the writ of habeas corpus in the present case — *Wampler* v. *Hill,* 11 Fed Supp. 540, states as follows:

> "A prisoner is detained, not by virtue of the warrant of the commitment, but on account of the judgment and sentence. The commitment is predicated upon the judgment, and must be in substantial accord therewith. It cannot contradict the judgment. In Re Biddle, *Warden* v. *Shirley* (C. C. A.), 16 F. (2d) 566, 567, it was said: 'The mittimus after conviction in criminal cases is a final process for carrying into effect the judgment of the court. *Scott* v. *Spiegel,* 67 Conn. 349, 35 A. 262; *Taintor* v. *Taylor,* 36 Conn. 242, 4 Am. Rep. 58; *People* v. *Moore,* 3 Park. Cr. R.

(N. Y.) 465. The prisoner is detained, not by virtue of the warrant of commitment, but on account of the judgment and sentence. *Howard* v. *U. S.* (C. C. A. 6), 75 F. 986, 989, 34 L. R. A. 509; *People ex rel. Trainor* v. *Baker,* 89 N. Y. 460. The mittimus is predicated upon the judgment of conviction and must be in substantial accord therewith. *Ex parte Cloy,* 4 Porto Rico, 20; 16 C. J. Paragraph 3122, p. 1328. It, of course, cannot vary or contradict the judgment upon which it is based.'

The judgment clearly undertook to impose a fine, but it did not direct that the defendant be imprisoned until payment of the fine. No authority has been called to my attention, and after diligent search I have not been able to find one, which holds that a defendant shall be imprisoned in case of his failure to pay a fine where the court has not so ordered in the sentence.''

A sentence imposed on a defendant in his absence is void.

3 Whar. Cr. L. (7 Ed.) 300;
1 Bish New Cr. Pro. 1291;
Ball v. *U. S.,* 140 U. S. 118;
Lewis v. *U. S.,* 146 U. S. 370;
Hopt v. *Utah,* 110 U. S. 574;
Cooley Con. Lim. (5 Ed) p. 390.

A defendant must be present when sentence is imposed upon him.

Hopt v. *Utah,* 110 U. S. 574;
Lewis v. *U. S.,* 146 U. S. 370;
Ball v. *U. S.,* 140 U. S. 118.

ARGUMENT.

(2)

The determination of the United States District Court for Maryland denying the petition to amend the commitment was not such a final order or judgment as to bar the appellee from securing a writ of habeas corpus to test the legality of his imprisonment.

The petition filed by appellee was in the original criminal case and apparently was forwarded by mail by the appellee to the Court. However if the incarceration was not according to law, the accused is entitled to a writ of habeas corpus.

The Circuit Court of Appeals (Ninth Circuit) in the case of *Copeland* v. *Archer*, 50 F. (2d) 836, held that the defendant was entitled to a writ of habeas corpus where the judgment and sentence was void (therefore clearly appealable) even though no appeal was taken from the original conviction. The lower court refused to grant the writ, saying that appellant had had ample time to perfect a direct appeal, and that therefore the sentence was not open to collateral attack. The court in reversing the lower court said:

> "The fact that appellant had the recourse of direct appeal during the time that he was serving the admittedly legal sentence under count one does not prohibit his making application for a writ of habeas corpus at the present time. We are not concerned with his motives for delaying the plea, whether they arose from simple ignorance of his rights under counts two and three or merely the desire to wait until he felt that he might secure a summary writ which would secure his freedom.
>
> "When the writ is applied for, the court must consider if the prisoner is serving under a sentence beyond

the power of the court to impose; there is no question of punishment of the applicant because he chose a method of review in which it seemed to him the rights of the government were least protected. * * * To deny the writ of habeas corpus, in such a case, is a virtual suspension of it; and it should be constantly born in mind that the writ was intended as a protection of the citizen from encroachment upon his liberty from any source, equally as well from the unauthorized acts of courts and judges as the unauthorized acts of individuals. *In re Bonner,* 151 U. S. 242."

ARGUMENT.

(3)

Habeas corpus will lie in one court to correct a commitment of another court which commitment does not conform to the sentence and judgment of the court.

If the appellee was illegally detained and imprisoned by virtue of a void commitment, he is entitled to be released by habeas corpus, it is submitted, by the Court in the district wherein the appellee contends his illegal imprisonment occurred.

Under Argument No. 2, there is cited and quoted the case of *Copeland* v. *Archer,* 50 F. (2d) 836. That case specifically holds that one is entitled to a writ of habeas corpus where the imprisonment is illegal even though the question could have been determined by a direct appeal in the original case.

Conclusion.

Counsel respectfully submit the answer to the first question should be that the provision in the commitment for the imprisonment in default of payment of fines and costs was void; and the answer to the second question should be that the ruling of the District Court was not such a final

order as to prevent another court from issuing a writ of habeas corpus to determine the validity of the commitment; and the answer to the third question should be in the affirmative.

Respectfully submitted,

ROBERT E. LYNCH,
Counsel for Appellee.

April, 1936.

(7742-C)

SUPREME COURT OF THE UNITED STATES.

No. 847.—October Term, 1935.

Henry C. Hill, Warden United States Northeastern Penitentiary, *vs.* The United States, *ex rel.* Thomas M. Wampler.	On Certificate from the United States Circuit Court of Appeals for the Third Circuit.

[May 18, 1936.]

Mr. Justice Cardozo delivered the opinion of the Court.

By an indictment in two counts the relator Wampler was charged with an attempt to evade and defeat the payment of his income tax under the laws of the United States through the filing in the years 1930 and 1931 of false and fraudulent returns. He was convicted in the United States District Court for the District of Maryland. On December 28, 1933, the judgment of the court was pronounced as follows: "Fine five thousand dollars and eighteen months in penitentiary on each count of the indictment, said terms of imprisonment to be computed as beginning this 28th day of December 1933; fines to be cumulative and terms of imprisonment to run concurrently and that traverser pay costs of proceedings." On the same day the clerk of the court issued and forwarded to the United States Northeastern Penitentiary at Lewisburg, Pennsylvania, a commitment in which the judgment was set out as follows: "That the traverser pay a fine of Five Thousand Dollars and be imprisoned in the United States Northeastern Penitentiary at Lewisburg, Pennsylvania, for eighteen months on each count of the indictment; said term of imprisonment to be computed as beginning this 28th day of December 1933; the fines to be cumulative and the terms of imprisonment to run concurrently; and that the traverser pay the costs of prosecution; and in default of payment of said fines and costs, he stand further committed until the payment of said fines and costs or until discharged by due process of law."

On April 21, 1935, when the term of eighteen months was approaching an end, Wampler filed in the United States District

Court for the District of Maryland a petition directed to the judge of that court in which he alleged that the court had not adjudged or ordered that he was to stand committed until the payment of the fine and costs; that this provision had been inserted in the commitment by the clerk; and that it was no part of the sentence. He prayed for an order amending the commitment by striking therefrom the words so added.

On April 25, 1935 the petition for amendment was denied, the judge filing an opinion in which he pointed out that Maryland is a common law state; that the practice in the state courts is not to include in the judgment of the court the express direction that the defendant stand committed until the fines are paid; that it has always been the practice in the District Court for the District of Maryland to follow the procedure in the state court, but that the clerk of the court has instructions from the court to include in the commitment the express provision that the defendant stand committed until the fines are paid, unless otherwise directed.* There was no appeal from that decision.

On July 23, 1935, the relator filed in the United States District Court for the Middle District of Pennsylvania a petition for a writ of habeas corpus alleging that the proper term of his imprisonment had expired and that his detention had become unlawful. The petition was granted, and the relator discharged. 11 F. Supp. 540. The warden of the penitentiary appealed to the Circuit Court of Appeals for the Third Circuit. That court after certifying the facts substantially as summarized above, requested our instructions upon the following questions (Judicial Code, § 239; 28 U. S. C. § 346):

"1. Was the provision in the commitment for imprisonment for nonpayment of fine and costs which was inserted by the Clerk but not included in the sentence orally pronounced by the judge, (a) void? or (b) merely irregular?

"2. Was the determination of the District Court on the petition to correct the commitment, a final judgment conclusive on the issue as to the validity of such commitment until reversed by appropriate proceedings for review?

"3. Will habeas corpus lie in one court to correct the commitment of another court which certainly, definitely, and specifically directs the imprisonment of relator for nonpayment of fine and

*See 10 F. Supp. 609, 611.

costs on the ground that such provision was inserted by the Clerk, but was not the sentence orally pronounced by the Court?"

The payment of a fine imposed by a court of the United States in a criminal prosecution may be enforced by execution against property in like manner as in civil cases. R. S. § 1041; 18 U. S. C. § 569. In the discretion of the court the judgment may direct also that the defendant shall be imprisoned until the fine is paid. *Ibid.*; and see R. S. § 1042; 18 U. S. C. § 641; *Ex parte Jackson*, 96 U. S. 727, 737; *Ex parte Barclay*, 153 Fed. 669; *Haddox* v. *Richardson*, 168 Fed. 635, 639. If the direction for imprisonment is omitted, the remedy by execution is exclusive. Imprisonment does not follow automatically upon a showing of default in payment. It follows, if at all, because the consequence has been prescribed in the imposition of the sentence. The choice of pains and penalties, when choice is committed to the discretion of the court, is part of the judicial function. This being so, it must have expression in the sentence, and the sentence is the judgment. *Miller* v. *Aderhold*, 288 U. S. 206, 210; *Wagner* v. *United States*, 3 F. (2d) 864; *State* v. *Vaughan*, 71 Conn. 457, 458; *Manke* v. *People*, 74 N. Y. 415, 424.

Two of the questions certified to us, the first question and the third, make mention of a variance between the commitment and the sentence "orally pronounced". If that were the only variance, we should deem it unimportant. The only sentence known to the law is the sentence or judgment entered upon the records of the court. *Miller* v. *Aderhold, supra; Wagner* v. *United States, supra; Manke* v. *People, supra.* If the entry is inaccurate, there is a remedy by motion to correct it to the end that it may speak the truth. *People ex rel. Trainor* v. *Baker*, 89 N. Y. 460, 466. But the judgment imports verity when collaterally assailed. *Ibid.* Until corrected in a direct proceeding, it says what it was meant to say, and this by an irrebutable presumption. In any collateral inquiry, a court will close its ears to a suggestion that the sentence entered in the minutes is something other than the authentic expression of the sentence of the judge.

The questions are to be read, however, in the light of the preliminary statement certifying the facts out of which the questions have arisen. Rule 37; *Stratton's Independence* v. *Howbert*, 231 U. S. 399, 422; *Dillon* v. *Strathearn S. S. Co.*, 248 U. S. 182, 184. From that certificate it is clear that the sentence spread upon the

records is identical with the sentence orally pronounced and that the only variance complained of is between sentence and commitment.* In such circumstances the word "orally" in questions 1 and 3 may be disregarded as superfluous, and the answers to the questions made as we would make them if the word had been omitted.

A warrant of commitment departing in matter of substance from the judgment back of it is void. *Boyd* v. *Archer*, 42 F. (2d) 43; *Wagner* v. *United States, supra.* Being void and not merely irregular, its nullity may be established upon a writ of habeas corpus. *People ex rel. Trainor* v. *Baker, supra; Boyd* v. *Archer, supra; McNally* v. *Hill*, 293 U. S. 131. "The prisoner is detained, not by virtue of the warrant of commitment, but on account of the judgment and sentence." *Biddle, Warden,* v. *Shirley*, 16 F. (2d) 566, 567; *Howard* v. *United States*, 75 Fed. 986, 989; *Ex parte Wilson*, 114 U. S. 417, 422; *People ex rel. Trainor* v. *Baker, supra.* If the judgment and sentence do not authorize his detention, no "mittimus" will avail to make detention lawful.

The argument is made that there is a practice in the Maryland District to make the commitment broader than the judgment, and that the practice should be given the quality of law. There is no such overriding virtue in usage or tradition. The court speaks through its judgment, and not through any other medium. It is not within the power of a judge by instructions to a clerk to make some other medium the authentic organ of his will. We are told that the instructions may be likened to a rule of court. They were not published; they were not reduced to writing; they are lacking in the formal safeguards that protect against mistake and perhaps against oppression. Cf. *Rio Grande Irrigation Co.* v. *Gildersleeve*, 174 U. S. 603, 608; *Weil* v. *Neary*, 278 U. S. 160, 169. There are times when settled usage is as efficacious as a written rule to fix the forms of practice. *United States* v. *Stevenson*, Fed. Cas. No. 16,395; *Norton* v. *Rich*, Fed. Cas. No. 10,352; *Detroit Heating & Lighting Co.* v. *Kemp*, 182 Fed. 847. A court will be cautious in applying such a doctrine where liberty is at stake. But here the

*In United States *v.* Wampler, 10 F. Supp. 609, 611, the court said: "The judgment as entered on the docket by the clerk recites the terms of imprisonment and the amount of the fine or fines, as announced in the sentence but does not recite the commitment in default of payment of the fine. This has been the long established practice, and was followed in this particular case."

traditional instructions have a defect more deep-seated than the absence of a writing. Taken at their face value, they fall short of the effect imputed to them. They do not profess to regulate the form or content of the sentence, which is to be recorded by the clerk without addition or amendment. They are aimed at the commitment, at that and nothing else, imparting to it a capacity, a superseding virtue, unknown to the law. Something more is needed than a few words of unrecorded talk between a judge and a prothonotary to compass that result.

The refusal to modify the warrant of commitment is not a bar to the relief now prayed by the relator. Finality within the doctrine of *res judicata* does not attach to every ruling upon law made by a judge upon the decision of a motion. *Denny* v. *Bennett,* 128 U. S. 489, 499; *Riggs* v. *Pursell,* 74 N. Y. 370, 378; cf. *American Surety Co.* v. *Baldwin,* 287 U. S. 156, 166. This is true though the ruling may have been pertinent or even necessary to the conclusion reached. In such circumstances finality will rarely be extended beyond the terms of the order, and applied to the supporting reasons. There is nothing in this case to call for a departure from the general rule.

A warrant of commitment spends its force, it fulfils what is at least its primary purpose, upon delivery of the prisoner at the place of his imprisonment. When "a prisoner is safely in the proper custody, there is no office for a *mittimus* to perform." *People ex rel. Trainor* v. *Baker, supra; Howard* v. *United States, supra.* Even after such delivery, the warrant is convenient evidence for the protection of the jailer, but it may be lost or destroyed, and detention may be justified by the underlying judgment. *Ibid.;* and see *Ex parte Wilson, supra.* The effect of an order refusing an amendment is to be adjudged with due regard to the character and office of the thing to be amended. At the time of that order the relator was lawfully imprisoned, the term of eighteen months being still unexpired. At the time of this petition the term was at an end, and imprisonment from then on had been turned into a wrong. The commitment was neither better nor worse because of the ruling of the judge that he would let it stand as written. If void, it was still void; if valid, it had received no accession of validity. What was said by the judge in the course of his opinion may be significant as a precedent; it is

ineffective as a bar. The writ of habeas corpus searches the record back of the commitment. It lays a duty on the court to explore the foundations, and pronounce them false or true.

We answer the questions submitted to us as follows, interpreting them, however, as explained in the opinion:

To the first question we say that the provision is void.

To the second question we answer "no", and to the third question "yes".

Ordered accordingly.

A true copy.

Test:

Clerk, Supreme Court, U. S.